

No. 90-512

Supreme Court, U.S.

FILED

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In The

Supreme Court Of The United States

OCTOBER TERM, 1990

LAMONT WARREN,
Petitioner,

v.

JOSEPH DWYER,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

On August 25, 1984, the respondent, Joseph Dwyer, an officer of the Hartford Police Department, was responding to a radio dispatch of a burglary in progress shortly after midnight in a high crime area of Hartford, Connecticut. Upon his arrival at the subject location, he observed four males moving quickly toward a vehicle. Because they were coming from the location of the complaint, Officer Dwyer stopped the men and requested identification, explaining that he was investigating a burglary. The three men that accompanied the petitioner, Lamont Warren, cooperated. They were not arrested. The petitioner refused to cooperate; instead, in a heated and hostile manner, Mr. Warren questioned what the officer was doing.

Fearing that the conduct on the part of the petitioner could cause a hazardous condition, as a crowd was beginning to form, Officer Dwyer warned the petitioner to calm down or he would be placed under arrest. The petitioner's conduct continued, and he was arrested by the respondent for the charge of breach of peace. The petitioner later stated he would "get" Officer Dwyer, and he was also arrested for threatening.

Both charges were not prosecuted, and the petitioner brought this action against the respondent pursuant to 42 U.S.C. Section 1983, alleging arrest without probable cause, denying him of his rights guaranteed by the Fourth and Fourteenth Amendments, and that the false arrest was in retaliation for the exercise of speech granted him by the First Amendment. The action was tried to a jury on the claims of excessive force, racial discrimination, intentionally filing a false report, and false arrest. In July, 1989 a jury in the trial court found in favor of the respondent on the first three claims and was unable to reach a unanimous verdict on the claim of false arrest.

The case was tried to a jury a second time, in December, 1989 for consideration of the claim of false arrest. After

hearing all the evidence, the jury determined that the respondent did not falsely arrest the petitioner. (Appendix to Certiorari Petition (hereafter "A"), A-8,9)

Counsel for the petitioner did not submit to the trial court, nor request that special interrogatories be considered by the jury at the second trial. Further, petitioner's counsel objected to a proposed verdict form that would have the jury establish whether or not the petitioner was falsely arrested by the respondent and, that fact notwithstanding if answered affirmatively, whether or not the respondent was entitled to the qualified immunity defense. The jury simply found that the respondent did not falsely arrest the petitioner. Without the jury considering special interrogatories, or the two-part verdict form (rejected by petitioner's counsel), there was no basis to definitively establish that the jury based its verdict upon the qualified immunity defense.

The petitioner appealed to the Court of Appeals for the Second Circuit, and it affirmed the judgment of the jury verdict below. It noted in its opinion that the verdict form submitted to the jury did not establish that the jury based its finding upon the defense of qualified immunity. (A-8,9) Recognizing the existence of the possibility that the jury could have based its finding upon that defense, the circuit court analyzed the trial court's charge to the jury and found that it was not so "inherently contradictory that it was confusing to the jury." (A-13) The circuit court concluded its opinion by indicating that unresolved factual questions can preclude the determination of the applicability of the defense of qualified immunity on a pretrial motion, or on a motion for directed verdict. It further held that in such instances these factual issues should be decided by the jury through the use of special interrogatories (which petitioner failed to utilize in this case). (A-13)

The petitioner then filed this "Petition for Writ of Certiorari."

SUMMARY OF ARGUMENT

This action was brought pursuant to 42 U.S.C. Section 1983. The petitioner claims that he was falsely arrested by the respondent, and further that the respondent was not entitled to the defense of qualified immunity, based upon the finding of the jury at trial. The petitioner did not request that special interrogatories be submitted to the jury, and specifically objected to a proposed verdict form that would have caused the jury to make two findings — one being the application of the defense of qualified immunity. Accordingly, it cannot be stated with certainty that the jury decided this case on the basis of qualified immunity.

The Second Circuit Court of Appeals recognized this and determined that qualified immunity is a matter of law for the Court. It did not treat this defense as a question to be determined by the jury, and the issue that the petitioner requests the Court to clarify could not have been decided more clearly by the Second Circuit Court of Appeals.

The petitioner claims that the issue of whether qualified immunity is a matter for courts to determine is unclear based upon a conflict in the circuits. The five circuits cited by the petitioner, and now including the Second Circuit, have all stated that this defense should be determined by the court as a matter of law. The factual disputes concerning this defense can be submitted to a jury through the use of special interrogatories, which was not done in this case.

The petitioner has failed to raise the special and important reasons necessary to compel the Court to exercise its judicial discretion to accept the Writ of Certiorari. The Second Circuit Court of Appeals has not ruled in such a way as to require the exercise of the Court's supervisory power.

The respondent respectfully requests that the Petition for Writ of Certiorari be denied.

REASONS FOR DENYING THE WRIT

1. CONTRARY TO THE PETITIONER'S SUGGESTION, THE JUDGMENT BELOW DOES NOT TREAT QUALIFIED IMMUNITY AS A JURY QUESTION.

This case does not raise any legal issues for this Court to resolve. The governing Fourth Amendment standards have been well settled by this Court, were properly identified by both courts below, and are accepted by the petitioner. Petitioner's grievance instead rests with the unfounded claim that the Court of Appeals approved a judgment based "on an instruction that allows a grant of immunity upon a civil rights violation that no reasonable officer should or would have committed." (Certiorari Petition (hereafter "Pet.") at p. 8) In short, the petitioner argues that "the judgment below moves the [qualified immunity] issue[] . . . from court to jury consideration." (Pet. at p. 9) This claim is without foundation for two reasons: (1) the petitioner failed to preserve any such issue for appeal; and (2) the Court of Appeals expressly held that the qualified immunity issue is one of law for the court.

With respect to the former point, the Court of Appeals stressed repeatedly that "[o]n the instant record . . . it is unclear whether the jury even considered the immunity defense in reaching a verdict of no liability." (A-10) While the plaintiff-petitioner claims that he took great exception to the district court's charging language (Pet. at pp. 4, 6), the Second Circuit recognized that:

[A]t [petitioner's] insistence . . . the verdict form presented the sole question: "Did Joseph L. Dwyer falsely arrest Lamont Warren?" An alternative form which posed the additional question, if Warren was falsely arrested, then "would a reasonable person have found that probable cause to arrest Warren was present?" was not submitted to the jury.

(A-9) It was against this backdrop that the Court of Appeals noted that "the thrust of [petitioner's] argument against submitting the issue of qualified immunity to a jury is not genuinely implicated in this case." (A-11 n.1)

The significance behind the petitioner's failure to preserve the instant grounds for appeal is twofold. On a practical level, the Court of Appeals declined to speculate whether the jury applied qualified immunity when the jury simply found that the respondent did not falsely arrest the petitioner. This Court too should decline to engage in the mind-reading exercise that the petitioner, the party who failed to ask the very question that would have obviated such speculation, advocates.

The failure to preserve the issue for appellate purposes is fatal to this appeal for a second, more fundamental reason; to wit, said failure invited the Second Circuit to segue into the ultimate, quite narrow holding of the case. The Second Circuit expressly dictated that in cases as the one at bar:

[T]he better rule . . . is for the court to decide the issue of qualified immunity as a *matter of law*. . . . If there are unresolved factual issues which prevent an early disposition of the defense, the jury should decide these issues on special interrogatories. The ultimate *legal* determination . . . is a *question of law* better left to the court to decide.

(A-13) (emphasis added). Thus, the petitioner's bald assertions aside, the Second Circuit patently established that the issue of qualified immunity is not a jury question. In doing so, however, the court was cognizant of and faithful to the teachings of *Anderson v. Creighton*, 483 U.S. 635, 641 (1987) (holding that "it is inevitable that law enforcement officials will in some cases ~~reasonably~~ but mistakenly conclude that probable cause is present, and . . . should not be personally liable."); as well as *Malley v. Briggs*, 475 U.S. 340, 343 (1986) (immunity should be recognized where officers of reasonable

competence could disagree on whether there was probable cause to support a warrant). In point of fact, the Court of Appeals stressed that although the question of immunity is distinct from the question of probable cause, there are situations where "it may be difficult to separate the immunity issue from the merits. See *Mitchell v. Forsyth*, 472 U.S. at 545. . . ." (A-12)

Because the Court of Appeals expressly found that qualified immunity is an issue of law for the courts to determine, but recognized that such a determination can sometimes hinge upon disputed questions of fact that juries should determine via special interrogatories, the petitioner's suggestion that there is ground for certiorari rings hollow and is without support in the record of this case.

2. THERE IS NOT A LONG-STANDING CONFLICT AMONG THE CIRCUITS.

The petitioner contends that there is a deeply rooted conflict among the circuits. The notion of conflict is illusory, a fact convincingly borne out by the petitioner's Petition for a Writ of Certiorari. Therein, the petitioner notes that the First, Fourth, Sixth, Seventh, and Tenth Circuits have all ruled that qualified immunity is a matter for judicial determination. (A-11)

As discussed above, the Second Circuit can be counted among those courts of appeals that find qualified immunity to be a matter of law for the court. (See A-13) Additionally, the court below cited a recent Fifth Circuit concurring opinion that suggests special interrogatories be used to determine facts supporting a defense of qualified immunity. See *Melear v. Spears*, 862 F.2d 1177, 1187-88 (5th Cir. 1989).

Juxtaposed to this extensive alignment of authority is a lone Ninth Circuit case, *Thorsted v. Kelly*, 858 F.2d 571 (9th Cir. 1988), which was not relied upon by the Second Circuit

below or in any other circuit to date. Having canvassed the remaining courts of appeal, it seems that they are silent on the matter. Accordingly, there is no "long standing" split in authority.

CONCLUSION

The respondent respectfully submits that the petitioner has failed to demonstrate a basis for the Court to exercise its judicial discretion to grant the Petition for a Writ of Certiorari. The Circuit Court of Appeals properly applied the law as set forth by the Supreme Court in *Anderson v. Creighton*, 483 U.S. at 641; *Malley v. Briggs*, 475 U.S. at 343; and *Mitchell v. Forsyth*, 472 U.S. at 545. The Second Circuit judiciously refrained from treating putative issues that were not properly before it, and where the facts of the case did not so merit. The questions presented in the petitioner's Petition for a Writ of Certiorari seek the Court's review of questions that are rendered academic by the facts and the law of this case.

The respondent respectfully requests that the Petition for a Writ of Certiorari be denied.

Respectfully submitted,

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